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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 286.

THE NEW YORK CENTRAL RAILROAD COMPANY, as Owner of the Carfloat "No. 37",

Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Claimant-Respondent.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Circuit Court of Appeals appears in the record at page 15 and is reported at 57 F. (2d) 144. The opinion of the District Court appears in the record at page 8 and is officially reported 52 F. (2d) 691.

Jurisdiction of This Court.

A petition for a writ of certiorari was filed August 5, 1932 (R. 21), and was granted by order of this Court filed October 17, 1932 (R. 21). Jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347) and under Article 3, Section 2 of the Constitution of the United States.

The Nature of the Case.

By this writ the petitioner seeks to review the decree of the United States Circuit Court of Appeals for the Second Circuit, filed April 12, 1932 (R. 20), petition for rehearing denied May 12, 1932 (R. 20), reversing the interlocutory decree in favor of the libellant entered by the United States District Court for the Southern District of New York, July 17, 1931 (R. 10, 11), on the opinion of the Honorable John C. Knox, District Judge (R. 8-10).

This suit was instituted by the petitioner as owner of carfloat New York Central "No. 37", to recover damages for injury sustained by that vessel on October 29, 1926, while lying moored at float bridge No. 6 at the terminal of the Long Island Railroad Company at Long Island City, N. Y., as a result of being struck by another carfloat which was brought into collision with the "No. 37" by respondent's tug "Talisman". It was agreed by the parties:

(a) That the collision and consequent damage were occasioned solely by reason of negligence of the tug "Talisman" (Stipulation of Facts, §1, R. 6);

(b) That the petitioner and the respondent were, at the time of this accident, common carriers engaged in interstate commerce, and that the respondent received petitioner's carfloat "No. 37" at the respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation of Facts, §3, R. 6-7);

(c) That more than four years prior to the accident in question, the libellant received by registered mail from the claimant, a certain notice dated July 31, 1920, pleaded by respondent as a bar to this action (Answer, Par. Ninth,

R. 5-6) and made no reply thereto, such notice reading as follows:

> "We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.
>
> On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.
>
> This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.
>
> This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn.
>
> Yours very truly,
>
> H. L. DES ANGES,
> Marine Superintendent."

(Stipulation of Facts, §5, R. 7.)

The respondent contended in the District Court and in the Circuit Court of Appeals that the Long Island Railroad Company was relieved of liability for damage to libellant's float by its notice of July 31, 1920, and that the act of the petitioner in sending its float to the Long Island Railroad Terminal for the interchange of traffic in interstate commerce, constituted an agreement to the notice and

a contract exempting the Long Island Railroad Company from liability for the damage sustained by float "No. 37".

Basis of Decisions Below.

The District Court (Knox, *D. J.*), held that as both petitioner and respondent were common carriers engaged in transportation in interstate commerce, and the petitioner in the discharge of the duty which it owed to the public was compelled to send its floats to the terminal which the respondent was required by law to maintain for the interchange of interstate traffic and, further, that inasmuch as the respondent was under an obligation to receive such freight as might be delivered to the terminal by petitioner, the petitioner's proper and usual facilities for carrying freight to the terminal were entitled to common law protection from negligent acts of the respondent during such reasonable periods of time as they were on respondent's property, and that the respondent's notice was a mere *ipse dixit* in an effort to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic with another carrier and was ineffective (Opinion, R. 8-10).

The Circuit Court of Appeals, reversing the District Court, held that the notice of the Long Island Railroad Company gave the terms upon which the respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 16). It held further that such an agreement was authorized under Sec. 3, par. 4 of the Interstate Commerce Act, authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal facilities" to any other carrier on such terms and for such compensation as the carriers may agree upon

or as the Commission may fix as just and reasonable (R. 18-19). The court therefore held that the case was within the doctrine of its decisions in the cases of *Ten Eyck* v. *Director General* (C. C. A. 2), 267 F. 974, certiorari denied, 254 U. S. 646; *The Cutchogue* (C. C. A. 2) 10 F. (2d) 671; *Sun Oil Company* v. *Dalzell Towing Company Inc.* (C. C. A. 2), 55 F. (2d) 63 (R. 16, 19).

The Circuit Court of Appeals therefore reversed the decree of the District Court and directed that the petitioner's libel be dismissed.

The decision of the Circuit Court of Appeals is directly in conflict with the applicable local decisions. The identical question here presented was decided with exactly the opposite result in the state courts of New York State in the case of *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474 (City Court of the City of New York, affirmed Appellate Term, without opinion, leave to appeal to Appellate Division denied). The decision of Judge Valente in *The Patchogue, supra,* was fully approved and followed in the District Court in this case by Judge Knox, who quoted at length from the opinion (R. 9). The Circuit Court of Appeals did not attempt to distinguish and, in fact, ignored the decisions of the courts of New York State on the identical question.

The Questions Presented.

1. *Can a carrier engaged in interstate commerce and maintaining a terminal, including floating bridges, for the receipt, delivery and interchange of freight in interstate commerce, exclude from its terminal, carfloats of a connecting carrier engaged in interstate commerce and impose on such connecting carrier terms, including an exemption from liability for negligent injury to the floating equipment of such connecting carrier, as a condition of allowing such*

floating equipment to receive or discharge freight in course of transit in interstate commerce, at its terminal?

2. *Did the petitioner, by sending its carfloat to The Long Island Railroad Terminal for the purpose of interchanging traffic in interstate commerce, thereby make a valid contract with the respondent The Long Island Railroad Company exempting the respondent from liability for damage sustained by petitioner's carfloat while at respondent's terminal as the result of respondent's negligence in the operation of other floating equipment owned and operated by the respondent?*

POINT I.

The Circuit Court of Appeals erred in holding that the petitioner entered into a contract exempting the respondent from liability for negligent injury to petitioner's carfloat. There was no consideration to support a contract and no act of petitioner constituting an agreement to the proposed "conditions".

The respondent relies upon an affirmative defense, that is, a contract to exempt it from liability for the results of its admitted negligence. The legal situation is precisely stated in the diametrically opposed decision of Judge Valente in the State Court in *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, which was ignored by the Circuit Court of Appeals:

> "It is not proven that plaintiff agreed to this letter, which, so far as appears, was a unilateral and voluntary communication by the defendant company, unacceded to, and unapproved by the plaintiff company. The burden emphatically, therefore, rests upon defendant to prove that the terms of this letter are

> legally authorized by law and juridically effective between the respective parties" (p. 476).

It is not asserted that there was ever any express agreement by petitioner to respondent's attempted self-exemption from liability for negligence, but the Circuit Court of Appeals accepted respondent's theory as follows:

> "As the matter stands, we have a notice giving the terms upon which the Long Island Railroad would receive floating equipment at its terminal and when the New York Central sent its carfloat there it must be regarded as having accepted the offer to receive it upon the terms indicated" (R. 16).

The decision presupposes that the Long Island Railroad had a right to state "terms" on which it would agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to exclude the New York Central carfloat from its terminal unless the conditions were accepted.

The Circuit Court of Appeals further said:

> "* * * the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 18).

The decision therefore assumes that the petitioner, although a connecting carrier, engaged in the service of the public in interstate commerce, with freight to discharge and receive at the Long Island Terminal, could decline to send its carfloat to that terminal if it were dissatisfied with the terms on which the Long Island Railroad Company was willing to permit the New York Central carfloat to discharge and receive freight at the Long Island Terminal.

We submit that both assumptions of the Circuit Court of Appeals are indefensible and that, if sustained, the decision will lead to chaotic conditions.

The relations of the parties with respect to this transaction were controlled by the provisions of the Interstate Commerce Act (Chap. 1, Sec. 3, par. 3)[1] entitled "Interchange of Traffic", which requires all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

The petitioner and the respondent are connecting carriers. It is stipulated that at the time of the accident petitioner's carfloat was lying in the respondent's float bridge and had been there received by the respondent in connection with the transportation in interstate commerce of freight cars and freight (R. 6). The interests of the parties in the through transportation of freight were mutually exclusive. The New York Central's interest in the contract of transportation ceased upon the transfer of the cars from its float to the Long Island tracks at the bridge and *vice versa*. The petitioner made no use of the respondent's tracks or terminal facilities. It merely placed its float at the bridge so that a transfer of cars and freight from one line to the other might be made. The respondent had no more right to exclude the petitioner's carfloat from entering its float bridge for this interchange of traffic than it would have to exclude from the loading platform of any of its freight stations an individual or a public drayman who came there for the purpose of receiving or delivering freight. No more could it impose terms or conditions.

The Circuit Court of Appeals ignored par. 3, *supra*, and attempted to justify its conclusion by asserting that the agreement which respondent attempted to impose on petitioner as a condition of affording the petitioner as a connecting carrier, reasonable and proper facilities for the interchange of traffic, was such an agreement as is authorized by that provision of the Interstate Commerce Act (U. S. Code, Tit. 49, Chap. 1, Sec. 3, Par. 4)[1] which au-

[1] Printed Appendix, page 23.

thorizes the Interstate Commerce Commission in the public interest to require the use of any terminal facilities of one carrier by another on such terms as the carriers may agree upon, or in the event of failure to agree, upon such terms as the commission may fix as just and reasonable.

The Court said:

> "We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. * * * It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right" (R. 18-19).

In this we submit the Circuit Court of Appeals fell into grievous error. Such a use of terminal facilities, as is contemplated by the section cited, is illustrated by such an outstanding example as the use of Grand Central Terminal, its tracks and facilities at New York City, owned by The New York Central Railroad Company, by the New York, New Haven & Hartford Railroad Company for the latter's own business and on a rental basis, or the use of the Union Station at Cleveland (see *Pittsburgh & W. Railway Co.* v. *U. S.*, 41 F. (2d) 806, aff'd 281 U. S. 479). The essential characteristic of the use of terminal facilities contemplated by Sec. 3, Par. 4, is the use of the terminal facilities of one carrier by another *for the latter's own business* for which use compensation and terms are evidently proper.

Plainly the intent of Par. (4) was not to authorize one carrier to impose terms on another as a condition of doing business with that other as a connecting carrier in interstate commerce. That situation is controlled by Par. (3), which requires all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

We believe our view of the scope of Par. (4) is fully borne out by an examination of its provisions upon which the following features are noted.

1. The power of the commission is limited to such cases of the required use of the facilities of one carrier by another as is practicable "without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle *its own business.*"

The implication is plain that the required use is to be one which would be likely to interfere with the full use of such carrier's facilities for its own business, *i.e.*, a use of those facilities by another for the business of that other.

2. The compensation to be fixed by the commission is "to be ascertained on the principle controlling compensation in condemnation proceedings".

Such compensation surely is to be paid for the use of the property of one, by another, for the sole benefit of that other. Clearly such compensation could not be awarded for the privilege of doing business with, or interchanging traffic with, the carrier owning or enjoying the use of terminal facilities.

3. It is provided that "such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced".

It is clear that such a provision could only be applicable to compensation in the nature of a rent and is totally inap-

plicable to facilities for interchange of traffic for the mutual benefit of the carriers involved.

No such use of the respondent's terminal facilities for the petitioner's business was offered by respondent or accepted by the petitioner in this case. There was only an interchange of traffic whereby business accepted by one carrier for through transportation became the business of the other upon transfer from petitioner's float to respondent's tracks or *vice versa*. No authority is granted to the Interstate Commerce Commission by the act to fix terms or conditions for such interchange. On the contrary, under Par. (3), respondent was obliged to afford all reasonable and proper facilities for such interchange.

Our view of the intent of Par. 4 is further fortified by consideration of its origin and of this court's construction of the provision which this paragraph superseded. The subject-matter of Par. 4 was first dealt with in a final proviso to Par. 3 of the original Interstate Commerce Act of February 4, 1887, Chapter 104, 24 Stat. 379, 380, similar to the present Par. 3 dealing with Interchange of Traffic, as follows:

> "But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section was amended by the Transportation Act of February 28, 1920, Chapter 91, Section 405, 41 Stat. 479, the proviso being omitted, and the provisions with respect to the use of terminal facilities of one carrier by another incorporated in a separate section, Par. 4 (U. S. Code Ann., Tit. 49, Chap. 1, Sec. 3, par. 3, p. 195).

The original proviso was construed by this Court in the case of *The Pennsylvania Company* v. *United States*, 236

U. S. 351, where this Court was called upon to consider the validity of orders of the Interstate Commerce Commission with respect to interchange of traffic between The Pennsylvania Company and a connecting carrier at Newcastle, Pennsylvania. This Court held that the proviso was not contravened by the Commission's order requiring the Pennsylvania Company to interchange traffic with its connecting carrier at that point even though the handling of the traffic required a use by the Pennsylvania Company of its terminal facilities. This Court said:

> "In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road, within the inhibition of this clause of section 3. The order gives the Rochester road no right to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots *for purposes of its own.* There is no requirement that the Rochester Company be permitted to store its cars in the yards of the Pennsylvania Company or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania railroad at the same point." (Italics ours.)
>
> *Pennsylvania Company* v. *U. S.*, 236 U. S. 351, 368-69.

Although the use of terminal facilities contemplated by Par. 4 of the present Act has not been defined by this Court, we submit that the use contemplated is exactly that referred to in the former proviso to section 3 and that the Court's view of the nature of that use, as expressed in the

case of the *Pennsylvania Company, supra,* is applicable. So viewed, no use by the petitioner of respondent's terminal facilities within the meaning of section 4 has been shown by the respondent, or in fact existed. The petitioner did not "run its cars over the terminals" of the Long Island Railroad Company "or use or occupy its stations or depots *for purposes of its own*". The respondent has failed to show that the contract it attempted to impose on the petitioner was one authorized by the provisions of the Act.

We submit, therefore, that the petitioner, not desiring to be bound by the conditions propounded by the respondent, acted properly in ignoring the notice and the conditions which the respondent had no right to propose. An appeal to the Interstate Commerce Commission under par. 4, such as suggested by the Circuit Court of Appeals, would have been inappropriate, for that section was totally inapplicable. We submit that the decision of the State Court in *The Patchogue* and of the District Court below were right in holding that the respondent offered the petitioner only the facilities it was bound to offer and that there was no consideration to support a contract.

On the other hand, it is equally true that the act of the petitioner in sending its float to the respondent's terminal was not voluntary and was consequently of no significance as an indication of its acceptance of the respondent's proposed conditions. As Judge Knox pointed out:

> "The libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 10).

Similarly, *B. & O. R. R. Co.* v. *Long Island R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, 477.

The cases relied upon by the Circuit Court of Appeals, *Ten Eyck* v. *Director General,* 267 F. 974, and *The Cutchogue,* 10 F. (2d) 671 (R. 16, 19), are quite inapplicable. In each of those cases the respondent offered to furnish a service (towage) which it was not, in any event, bound to furnish. The libellant was a free agent not for any reason required to accept the service offered. The libellant in accepting the respondent's offer in those cases, of course, accepted the offer as made, including the conditions attached. The situation was the same in the case of *Sun Oil Co.* v. *Dalzell Towing Co.,* 55 F. (2d) 63 (cited, R. 16) except that there the service furnished was pilotage.

In those cases the libellant's voluntary act could fairly be regarded as an acceptance of the offer. In this case the respondent was bound to afford facilities for the interchange of traffic and could not lawfully impose conditions; the petitioner's act in sending its float to respondent's terminal for the interchange of traffic was obligatory in the performance of its duty to the public and consequently involuntary and of no significance as an acceptance. The essential elements of a contract, *i. e.,* valid offer, consideration and acceptance were, therefore, totally lacking. We submit that the holding of the Circuit Court of Appeals that the petitioner when it sent its carfloat to the terminal contracted that the Long Island Railroad should be free from liability suffered through the latter's negligence is wrong and should be reversed.

POINT II.

The contract which respondent attempted to impose upon petitioner was in no event a valid contract exonerating respondent from liability for negligent injury to petitioner's carfloat under the circumstances of this case.

The State Court in ruling on the identical defense of the respondent in a case involving another connecting carrier said:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani Bros., Inc.* v. *Wilson Sons & Co., Ltd.*, 188 App. Div. 617, 620."
>
> *B. & O. R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. (N. Y.) 474, 478 (City Court of the City of New York, decision affirmed Appellate Term —leave to appeal to Appellate Division denied).

Judge Knox in the District Court quoted from and approved the opinion in the case just cited (R. 9). He added:

> "During such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 10).

It is the established doctrine of this Court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation.

Santa Fe Railway v. *Grant Bros.*, 228 U. S. 177, 184;
Railroad Company v. *Lockwood*, 17 Wall. 357;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397;
Baltimore & Ohio Rwy. Co. v. *Voight*, 176 U. S. 498, 507;
Knott v. *Botany Mills*, 179 U. S. 69, 71;
The Kensington, 183 U. S. 263, 268.

We submit that the District Court and the State Court were correct in their view of the right of the petitioner to common law protection of its property while dealing with the respondent at its terminal. Petitioner, as a connecting carrier, was dealing with the respondent on the same basis as any other member of the public and had the same rights——

A. T. & S. F. R. R. Co. v. *Denver etc. R. Co.*, 110 U. S. 667, 681.

The carrier's duty to the public includes the obligation of ordinary care towards persons lawfully visiting the carrier's terminal for the purpose of doing business with the carrier.

Bennett v. *R. R. Co.*, 102 U. S. 577;
Illinois Central R. R. Co. v. *Griffin* (C. C. A. 7th), 80 Fed. 278;
Wilson v. *Union Pac. R. R. Co.*, 107 Nebr. 111;
Louisville R. R. Co. v. *Morgan*, 165 Ala. 418;
Toledo, etc. R. W. Co. v. *Grush*, 67 Ill. 262;
Burrow v. *Missouri Pa. R. Co.*, 220 Missouri App. 337;

Certainly any member of the travelling public, having lawful business which requires him to enter or approach the

terminal of a public carrier, is entitled to common law protection against injury by negligent act of the carrier, and a notice posted on the premises notifying the public that the carrier will not be liable for negligent injury to persons visiting its terminal on lawful business would certainly be held ineffective. We submit that this is exactly what the respondent has attempted in this case and what the Circuit Court of Appeals has upheld, and that the attempted contract sought to be imposed by the respondent on the libellant should, in no event, be held valid.

The petitioner for certiorari in *The Sun Oil* case, *supra* (No. 38 October Term, 1932, argument on the writ, November 16, 1932, not yet decided at the printing of this brief), has questioned the validity of the contract exempting the Dalzell Towing Company, Inc. from liability for negligence of a pilot furnished under contract and has pointed out the conflict between the decisions in the Second Circuit and other Circuits as to the validity of similar contracts in towage cases, such as *Ten Eyck* v. *Director General* and *The Cutchogue, supra,* based on varying interpretations of the decisions of this Court in *The Steamer Syracuse*, 12 Wall. 167, and *Compania de Navegacion* v. *Fireman's Fund Insurance Company* (*The Wash Gray*), 277 U. S. 66.

The contracts under consideration in those cases were not the contracts of common carriers as this Court has held that a tower is not a common carrier. *The Syracuse,* 12 Wall. 167, 171; *The White City,* 285 U. S. 195, 200. Although the contract in the case of *The Cutchogue* was made by the Long Island Railroad Company, it was a contract for towage which was entirely outside of the scope of that Company's functions as a common carrier.

If this Court should decide that the contracts in those cases were not valid, *a fortiori,* the contract which the

respondent sought to impose on the petitioner in this case which related directly to the liability of the respondent in performing its functions as a common carrier of freight in interstate commerce would be invalid. On the other hand, we submit that irrespective of this Court's decision as to the validity of the contract in *The Sun Oil* case, the contract which the respondent, Long Island Railroad Company, sought in this case must be held invalid under the decisions of this Court holding that common carriers cannot secure immunity from liability for their negligence in the performance of their duties as common carriers by any sort of stipulation.

> *Santa Fe Railway Co.* v. *Grant Brothers*, 228 U. S. 177, 184.

The respondent relies on the last named case as justifying the alleged contract in this case because of this Court's holding there that—

> "there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation" (p. 185).

In that case a contract was made between a railroad company and a construction company for construction of a spur line. A provision of the contract exempted the railroad company from liability for negligence in transportation of property of the construction company to and from the works at a very low rate. This Court held that the railroad company was not acting as a common carrier in contracting for the building of its extensions and branches (p. 186). The Court said:

> "If the railroad company did the work directly it

> would have to take its employees and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree" (p. 187).

Clearly such an agreement is entirely outside the scope of the normal business of transportation of the carrier. Not only has the company a good consideration to offer for such exemption in the reduced rate for transportation as in the cases where free transportation is furnished on passes, but the considerations of public policy which have led to the banning of contracts exempting the carrier from liability for negligence in the performance of its functions as a common carrier are not applicable (see p. 188).

The case of *Central Railroad Company of N. J.* v. *Anchor Line, Ltd.*, 219 Fed. 716 (also cited by the Circuit Court of Appeals, R. 18), deals only with the question of allocation of charges for demurrage as between a railroad company and ocean carrier and the applicability of published tariff charges of the railroad to the ocean carrier under the circumstances of that case.

We submit that the alleged agreement exempting the respondent from liability for negligence in the performance of its duty as a common carrier can in no event be justified in view of the decisions of this Court establishing the principle that such contracts are in conflict with public policy and invalid.

POINT III.

Even if it is held that there was a valid contract that contract should not be construed to release the respondent from liability under the circumstances of this case.

The notice claiming exemption from liability was prepared and issued by the respondent. The contract having been prepared by the respondent and the burden resting on the respondent to establish a lawful contract exempting the respondent from liability, that notice must be construed most strictly against the respondent and the respondent should not be exempted from liability for damage fron negligence unless such is clearly within the provisions of the notice:

> *Baltimore & Ohio R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. N. Y. 474, 478;
> *American Surety Co.* v. *Pauly* (No. 1), 170 U. S. 133, 144;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, 279.

This rule was quite evidently followed by this court in in the towage cases.

> *The Syracuse*, 12 Wall. 167;
> *Compania de Navegacion* v. *Fireman's Fund Insurance Co.* (*The Wash Gray*), 277 U. S. 66.

We submit that this notice should be construed to be limited to carfloats "lying at Long Island Railroad Company terminals" beyond "such reasonable periods of time", in the language of Judge Knox (R. 10), as required for the interchange of traffic. We submit that a distinction can and should be drawn between floats moored in the float bridge for interchange of freight, and floats lying at

the terminal beyond such reasonable periods of time as required for that purpose.

The respondent itself makes this distinction. In the brief in opposition to petition for writ of certiorari (p. 12) the respondent bases its argument that there was a valid consideration to support the alleged contract on the following statement:

> "Whether or not respondent was obligated to accept petitioner's float is beside the point. Respondent was not obligated to let petitioner's float *lie* at its terminal upon *any terms*. It could have insisted that petitioner maintain a tug to handle its own floats and tow them away as soon as loaded or unloaded. On the other hand, if petitioner objected to allowing its equipment to lie at respondent's terminal upon the terms set forth in the notice, petitioner could have made arrangements to tow such equipment away as soon as loaded or discharged."

The respondent has not shown that the petitioner's float lay at the terminal beyond the reasonable period of time required for the interchange of traffic. If such consideration is required to support respondent's alleged contract, the respondent has failed to show it. On the contrary the fair implication of the stipulation of facts is that the float was actively engaged in the business for which it was sent to the terminal at the time the damage was inflicted. As thus interpreted, the notice has not been shown to be applicable to the damage sustained by the petitioner in this case and should not be sustained as a defense.

Moreover, even if it is considered that the petitioner was making use of the terminal facilities of the respondent at the time of this accident, the injury to petitioner's carfloat was in no way related to or occasioned by that use. It was merely a circumstance that the float was lying in

the float bridge when injured by the respondent through negligence in the operation of other floating equipment. At least, we submit that the contract should be limited to the normal risks of operation of such float.

CONCLUSION.

We submit that no valid contract exempting the respondent from liability under the circumstances of this case has been shown; that the decision of the Circuit Court of Appeals is wrong and should be reversed; and that the interlocutory decree of the District Court reinstated.

Respectfully submitted,

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Of Counsel.

Appendix.

EXTRACTS FROM INTERSTATE COMMERCE ACT, U. S. CODE, TIT. 49, CHAP. 1, SEC. 3, PARS. 3 & 4.

(3) INTERCHANGE OF TRAFFIC. All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) TERMINAL FACILITIES; USE OF AND COMPENSATION FOR. If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation procedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other

carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, c. 104, §3, 24 Stat. 380; Feb. 28, 1920, c. 91, §405, 41 Stat. 479.)